SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 1.

CITY OF NEW ORLEANS, APPELLANT,

versus

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS., APPELLEES.

SUPPLEMENTAL MEMORANDA ON BEHALF OF APPELLEES.

I.

The first point in our original brief is, that under the law of Louisiana, the City of New Orleans could not itself lawfully repeal the Ordinances conferring rights on the Railway Company, and at page 24 of our original brief, we cited Articles No. 2045 (2040) and 2047 (2042), which are express to the effect that a dissolution of a contract where one of the parties is claimed to be in default, under the facts of this case, must be sued for, and the party in default may, according to circumstances, have a further time allowed by the Court for the performance of the condition, and that in case of dissolution the other party must restore what has been received.

Since that portion of the brief was prepared, the Supreme Court of Louisiana has rendered two opinions in which the general doctrine is again recognized. We refer to the cases of Railroad Company vs. Mayor, 48 La. An. 1102-1115, and State ex rel Railroad Company vs. City Engineer, 49 La. An. 678.

In the former case, 48 La. Annual, 1115, the City of Monroe had undertaken to repeal an ordinance granting rights to a railroad, and then to defend a suit on the strength of this repeal.

But although the ordinance was claimed to be *ultra vires* of the City, the Court said:

"We would not be justified in treating the ordinance as void. It must remain in force until decreed null *in proceedings to that end.* * * *

"Municipal corporations have no power to pass ordinances transferring a privilege or right for an expressed consideration and afterwards repeal them without granting to the transferees of the privilege or right the least hearing."

In the latter case, 49 La. An. 676, 679, the City of New Orleans had undertaken to repeal an ordinance which had granted certain franchises to a railroad company. The Court cited the case in the 48 La. An. 1115, and said:

"We must adhere to the principle laid down in that case. It applies here. It is an équitable principle applying even if a contract is null in its origin. *Multa fieri prohibentur quae si facta fuerint obtinent firmitatem.* If a contract is voidable proper steps must be taken to have its nullity declared."

Referring again to Gayden vs. Railroad, 39 La. Annual, 269, it may be noted that the point we make was made by counsel for the railroad in that case, as follows:

"The condition expressed in the grant that it should be

void if the road should not be completed within eighteen months was nothing but an express resolutory condition where the happening of the condition depended on the act of one of the parties, and (the grant) therefore, was not dissolved of right by the failure of the party to do, and could only be dissolved by a preliminary default followed by a suit to dissolve. Civil Code, Art. 2047."

There was verdict and judgment for plaintiff in the lower court, but the judgment was reversed and the suit dismissed. The Court pointed out that there was not even an allegation that the Railroad Company had been put in default (p. 272). The road was not built for about two years, although the contract provided, that should the railroad be not built within eighteen months from the date, then the contract shall be null and void; a stronger case, perhaps, against the railroad than can be claimed by appellant at the bar.

The opinion was delivered by the late Chief Justice BERMUDEZ, who was thoroughly versed in the law and jurisprudence of France, as well as of Louisiana. After speaking of the delay of some six months, on the part of the railroad, beyond the time agreed, the Court said:

"It does not however follow, that, on that account, the contract was *ipso facto* dissolved. Delsol, V. 3, No. 821.

"The plaintiff contends that the decision of the case is to be controlled by Article 2038, R. C. C., which provides that: 'When an obligation has been contracted on condition that an *event* shall happen within a limited time, the contract is considered as broken, when the time has expired without the event having taken place.'

"Plaintiff leaves out of view other provisions of law on the subject of resolutory conditions which bear upon this question.

"The Code defines the dissolving condition as that which, when accomplished, operates the revocation of the

obligation, placing matters in the same state as though the obligation had not existed. R. C. C. 2045.

"It further declares, that the obligation (condition) is implied in all commutative contracts, to take effect in case either of the parties *do not comply with his engagements*, in which case the contract *is not dissolved* of right. It leaves to the party complaining a right to sue for its dissolution with damages, or exact specific performance, according to circumstances. Indeed, the law wisely so provides, for the obvious reason that, although the obligor may apparently be in default, still he may not be so in reality, and for some good reason, such as *vis major*, obstruction by the obligee, actual or constructive extension of time, etc. This is the reason for which, according to circumstances, the Court may allow some further delay for compliance with the obligation. Delsol, Vol. 3, p. 483, No. 821.

"When the resolutory condition is an *event* not dependent on the will of either party, the contract is *dissolved of right;* but when that event is dependent on such will, the contract is not absolutely dissolved of right, and its dissolution must be judicially sought. R. C. C. 2047.

"Under the spirit and letter of the law, the resolutory condition may therefore consist in an event which does not depend, in any manner on the act of the parties, or it may have for object a fact dependent on the will of one of them.

"In the first case, it operates its effect of right, while in the second, the party complaining may exercise the right which results from the condition *only* by having it judicially ordered as a penal clause.

"The article relied on by plaintiff refers to an *event* not dependent on the parties; the others allude to acts dependent on the will of either party. With this distinction the case is clear. * * *

"The Articles of our Code are literal extracts from the French Code. It is in the sense which we have expressed that the provisions in the latter have been understood and expounded. R. C. C. 1912, 2047, 2563; C. N. 1183, 1184."

The ancient French law, as expounded by Pothier, and the Code Civil of France, and the French commentators are in accord on this special point. In addition to the citations made by Ch. Justice Bermudez, we may refer to Pothier on Obligations, Part 3, Chapter 7, Article 2; Evans Pothier, p. 490 (636); Domat, Cushing's Ed., Vol. 1, pp. 185, 193, 196; Larombiere on Obligations, Vol. 2, p. 290 *et seq.* At p. 352, the last named author, a distinguished French Judge, says:

"Let us pass on now to the exercise of the resolutory action. The contract is not dissolved *pleno jure;* the dissolution should be demanded in a court of justice, and a delay can be accorded to the defendant according to the circumstances. A commentary upon our Article (1184) is complicated a little with questions of procedure. As the resolutory action is an extreme action in reparation in damages, whether damages are allowed or not to the plaintiff, it is related under this aspect to the theory of putting in default. The creditor (meaning any party to the contract who makes a claim under it) should put his debtor (that is the other party) in default, at least when the question is one of simple delay.

* * * * *

"But it is not enough to have put the contravening party in default. The dissolution ought to be pronounced by a court of justice. The creditor is then obliged to prosecute an action."

* * * * *

The following provisions of the Louisiana Code may be referred to upon the subject of the default which is mentioned in the foregoing decisions and commentary:

"Art. 1911 (1905). The debtor may be put in default in three different ways; by the terms of the contract, by the act of the creditor, or by the operation of law.

"1. By the terms of the contract, when it specially pro-

vides that the party, failing to comply, shall be deemed to be in default by the mere act of his failure.

"2. By the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

"3. By the operation of law. This takes place in cases where the breach of the contract alone is *by law* declared to be equivalent to a default. The law having declared that the neglect to return a thing loaned for use, at a stipulated time, or the application of it to another use than the one for which it was lent, puts it at the risk of the borrower; this, without any act of the lender, puts the borrower in default, and forms an example of this part of the rule.

"Art. 1912 (1906). The effects of being put in default are not only that, in contracts to give, the thing which is the object of the stipulation is at the risk of the person in default; but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract.

"Art. 1926 (1920). On the breach of any obligation to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require *the dissolution of the contract*, and in all these cases damages may be given where they have accrued, according to the rules established in the following section."

In the case at the bar the railway was not put in default by "the terms of the contract," for there is no such language in the ordinances, and such language would have to be very clear and full, as shown by Mr. Marcadé in his commentary on Article 1184 of the Code Napoleon. He says, Vol. 4, p. 489:

"If the party, even in saying that the resolution will be operated *pleno jure*, has not taken care to add that there

shall be no need of any summons or citation, or, equivalent words, the resolution will result only from a summons to execute remaining unexecuted. If, on the contrary, one has been careful to say in the contract that the resolution will be operated by the sole fact of inexecution and without need of summons or any other formality, the resolution will be realized *pleno jure.*"

There cannot be two opinions as to the repealing Ordinance 1828, C. S. It was illegal on this ground alone. As for repealing Ordinance 685, C. S., concerning the lease of the Park Batture, it was equally illegal on this score, as well as for the other reasons we urge. The City never returned or offered to return the $1000 it had received, and has never sued to dissolve the lease. As held in State vs. City Engineer, 49 La. An. 679, above cited, "even if a contract is null in its origin, its disolutions must be sued for." And as a preliminary to such suit, there must be a restitution. Our Code in Articles already cited intends that on the dissolving of an agreement, the parties shall be restored to their original condition; Article 2044 (2040); and the further provision is made where want of power or capacity is alleged:

"Article 1793 (1787). If in a contract with an incapacitated person, or in a contract void for want of form, entered into with one for the benefit of such incapacitated person, any consideration be paid or given, and the contract be afterwards invalidated on account of such incapacity or want of form, the consideration so paid or given must be restored if it was applied to the necessary use or benefit of the incapacitated person."

Thus, in McCall vs. Henderson, 11 La. Annual, 209, 211, where a minor had purchased property without authority at law, his obligation to tender back the property, in a suit to rescind, is recognized. The *restitutio in integram* is a

plain doctrine of equity, as old as the classical jurists. And it has been repeatedly recognized by the Courts of equity. See Grimes vs. Sanders, 93 U. S. 62. In City of New Orleans vs. Steamship Co., 20 Wallace, 387, the City claimed that a lease of a wharf was *ultra vires*, pp. 391, 392, both of the City and its officers. This Court laid stress on the fact that the City had received and kept the rent, and yet proceeded to act as if the lease was null and had no existence at all.

Mr. Justice HUNT, in concurring, laid great stress on this fact as a ratification with knowledge, and cited abundant authority, p. 401. The Court said, at p. 396, that it might well be held "that the City was estopped from denying the validity of the lease by receiving payment of one of the notes."

The lesson of the case was that the City should have tendered back the rent and sued to annul.

II.

In our original brief and in the foregoing point we have treated the conditions of the grants made by the ordinances as resolutory or subsequent. The City of New Orleans now claims two of them to be suspensive or precedent.

This is a manifest error on the part of the City. It might be enough to refer to the case of Gayden vs. Railroad, above cited, 39 La. Annual, 269, where similar conditions were held to be resolutory or subsequent.

In Cornell vs. Hope Insurance Company, 3 Martin N. S., 223-226, it was noted that the suspensive condition is in

effect a condition precedent, and that the dissolving condition is something different.

The late Professor Dwight, of Columbia Law School, who passed his learned life in the study and teaching of these and other distinctions, says, in an article in Johnson's Cyclopedia, *verbo* "condition:"

"Conditions as to their form are either express or implied: as to their relation to the estate, they are either precedent or subsequent. A condition is said to be precedent when it precedes the *vesting* or enlarging of the estate. It is subsequent when the estate, *having vested*, its regular effect is to defeat it. The distinction does not depend upon any form of words, but upon the intent of the parties. It will be observed that the regular effect of a condition subsequent is to lead to a forfeiture. As the spirit of the law is opposed to forfeiture, it is governed by technical rules that would not be applied in case of a mere action upon a promise or covenant. Great care must be taken not to confound rules which appertain to the one subject with those which prevail in the other. It is an elementary rule that a condition subsequent does not affect the *nature* of the estate; it only qualifies it to this extent, that on the happening of the specified event it may be made to *terminate* before its natural expiration. Thus, an estate in fee, or for life, or for years, remains a member of its class, though it may be defeated by the happening of the event which is called a condition. It should also be stated that the happening of the prescribed event does not *of itself* defeat the estate. There must be an affirmative act on the part of the grantor, whereby he repossesses himself of his estates. This is technically called a 're-entry.' In well-drawn instruments a power of re-entry is expressly reserved."

He further gives an example of a condition subsequent which goes to defeat an estate, as where land is devised to a daughter, the estate to be defeated in case she should enter a convent.

And see United States vs. Repentigny, 5 Wall. 211, 254, 255, 267, 268, as to conditions subsequent and their enforcement to defeat a grant at common law.

Now, to compare this with the civil law we find that Larousse, Grand Dictionnaire Universelle, gives these definitions. (We translate):

"Condition suspensive: That which *suspends the executions of a disposition*, or of an obligation, *until* the realization of a future event (fait prévu).

"Condition resolutory: That which operates when it is accomplished, the *revocation* of the obligation or the *disposition*." (Disposition here means grant).

The Civil Code of Louisiana does not differ except in fullness from the French Code. It says:

"Art. 2021 (2016). Conditional obligations are such as are made to depend on an uncertain event. If the obligation is *not to take effect* until the event happen, it is a suspensive condition; if the obligation *takes effect immediately*, but is liable to be *defeated* when the event happens, it is then a resolutory condition.

"Art. 2024 (2019). The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder.

"Art. 2025 (2020). A mixed condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event.

"Art. 2026 (2021). Conditions are either express or implied. They are express when they appear in the contract; they are implied whenever they result from the operation of the law, from the nature of the contract, or from the *presumed intent of the parties*.

"Art. 2043 (2038). The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties.

"In the former case, the obligation *cannot be executed* till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event be known.

"Art. 2045 (2040). The dissolving (resolutory) condition is that which, when accomplished, operates the *revocation* of the obligation, placing matters in the same state as though the obligation had not existed.

"Art. 2046 (2041). A resolutory condition is implied in all commutative contracts, to take effect in case either of the parties do not comply *with his engagements;* in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances in case permits, demand a specific performance.

"Art. 2047 (2042). In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event not depending on the will of either party, the contract is dissolved of right; but, in other cases, *it must be sued for*, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition."

The French commentators are full of illustrations of the difference between the suspensive and the resolutory or dissolving condition, but we do not know of one who contravenes our views on the subject.

Pothier is very clear. He shows that the suspensive condition suspends the obligation. It cannot take effect or vest anything until the condition is fulfilled. Evans Pothier, Vol. 1, p. 198: while resolutory conditions "are those which are added, not to suspend the obligation until their accomplishment, but to make it cease when they are are accomplished," p. 214. The former, then, are similar to conditions precedent, which delay or suspend the vesting of an estate until they happen. The latter are similar to

conditions subsequent which do not delay or suspend such vesting of the estate, but may defeat it after it has vested. Mr. Larombière, Vol. 2, p. 2, gives an illustration as follows:

"I sell you my house, and at the same time I stipulate that the sale shall be dissolved if the ship *Veloce* arrives from Smyrna. I promise to give you 1000 francs if a certain ship returns from America. The event that I anticipate forms a condition, in the former case, resolutory, in the latter, suspensive."

In other words, considering the 1000 francs as an estate, it will not vest until the ship returns from America. The effect of the agreement is suspended. The return of the ship must precede the vesting. In the other case the house will vest in the purchaser, but the subsequent condition, when it occurs, will defeat or dissolve the estate.

Now, we submit that the ordinances in our favor of 1880 and 1881 were grants *in presenti* and vested the rights thereby granted at once. Such is their plain language. In Schulenberg vs Harriman, 21 Wall. at p. 60, the grant of lands to the State of Wisconsin was held to be *in presenti* and to pass an immediate and present interest, under language no stronger, if as strong. And in that case the Court said further, p. 62, that the provision, that all lands remaining unsold after ten years should revert to the United States if the road be not then completed, was no more than a provision that the grant should be void if a *condition subsequent* be not performed, and cited the law from Sheppard's Touchstone as follows:

"If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, etc., or that he shall take it again and turn it to his own profit,

In deciding whether a condition is suspensive or resolutory, a doubt is solved in favor of the latter, for the plain reason that is given by Mr. Larombière. He says:

"We interpret obscure and ambiguous clauses as forming a resolutory, rather than a suspensive, condition. In fact, contracts left to their natural force and to the ordinary dispositions of law, produce *immediate* results. * * * To contract, and then to remain in the *statu quo* of a suspensive condition is something so little in harmony with the natural effect of a contract, that one can admit it only on the evidence of complete proof. It is then to enter at once into the spirit of the law and into the intention of the parties when we *presume*, in case of doubt, *that a condition is resolutory rather than suspensive*." Vol. 2, p. 8, No. 8.

or *or that the land shall revert*, or that the feoffer shall *re-cipere* the land, these are either of them good words in a condition to give a *re*-entry as good as the word *re*-enter, and by these words the estate will be made conditional."

See also Grinnell vs. Railroad Company, 103 U. S. 739, 742:

In R. R. Land Co. vs. Courtright, 103 U. S. 310, the stringent terms imposed upon the Railway Company in the grant of lands by the State of Iowa were held to be conditions subsequent; this Court saying that: "the terms in which the right is reserved, by the act of the State, to resume the lands granted, imply what the previous language of the act declares, *that a present transfer was made, and not one dependent upon conditions to be previously performed*," p. 316.

And see R. R. Co. vs. Phelps, 137 U. S. 528; U. S. vs. Southern P. R. Co., 146 U. S. 570, and cases there cited by this Court.

Now, reading the ordinances here as grants; and such they are, on expressed considerations moving to the City; we find that they are all *in presenti*. The preambles each and all indicate an intention to give the Railroad Company a present right to lay tracks, and build similar works, in public places, and to operate them. Trans. pp. 54, 56 and 58. Then follow in each ordinance the grants themselves, in words whose meaning is not doubtful. The Company *is* authorized to lay its tracks, etc., p. 54; it *is* authorized to locate and construct tracks, switches, etc., in the streets named, p. 55; it *is* authorized to lay tracks, etc., on Thalia street, p. 56; it *is* authorized to locate and maintain a railroad along the western border of the Park, pp.

58-59; the right is conferred to, at once, establish the Thalia street terminals, foot of p. 59.

The recitals at page 58 show that the Company acquired the road from Bayou Goula down to a point opposite New Orleans, "as part of its through line," from Shreveport to New Orleans; see Charter at p. 50; and grants are made to get this important artery of commerce and object of taxation into the City with its terminals and its necessarily large taxable values.

All is in the present tense. Is it conceivable that such grants were made on suspensive conditions so that they should be hung up and ineffective until those conditions should be fulfilled? It is unthinkable. It is impossible. The theory is self-contradictory. Look at the last section of the last of the granting ordinances at page 60 of the transcript, which sums up the conditions, as the City reviewed the matter in March, 1881:

"Sec. 6. Be it further ordained, etc., That the right of way, franchises and privileges herein and *heretofore* granted to the New Orleans Pacific Railway Company, *are and were* granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall *last and continue;* and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall *cease and determine*, and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and the further

condition that said railway company *shall construct or control a line of road*, ready for public use, from a crossing of the Mississippi river to its designated terminus in this city, *within two years from the promulgation of this ordinance.*"

And see also Section 4 of first ordinance, at p. 55 of transcript.

We see at once that the rights *are and were* granted; that they are to *last and continue* as long as the terminus in the City shall be maintained; that if the terminus be removed from within the city limits then the grants shall *cease and determine;* that construction work shall be done in a certain way, and a line of road constructed or controlled within a certain time. If these conditions are suspensive so that the grants do not go into effect or vest until the conditions are fulfilled, how could we lay tracks under them or establish transfer facilities, or wharves, or terminals; and, how is it that grants made in the present tense are to last and continue for a certain period and then cease and determine, if they have never vested?

In one breath the City tells us that the grants do not go into effect; that they do not vest, because the conditions are suspensive; and in the next we are accused of not having done a quantity of railway building under grants that are said not to have vested or gone into effect.

The fact is, as Prof. Dwight remarks, that the distinction between conditions suspensive or precedent and resolutory or subsequent, "does not depend so much on any form of words as upon the intent of the parties." Can it be sanely supposed that a city, so anxious to attract a trunk line, would hang up its grants so that they could not take effect for an indefinite period; or that the company would accept

such grants with the prospect of being gravely told: "You must not build anything in these public places, because the grants have not yet vested; and, if you do not build, we will declare your rights forfeited?"

But passing from such general views to the special points made in appellants assignment and brief, we find that every condition is now conceded to be resolutory save two, which are propounded in this form:

1. The establishment by the railway of its terminus within the area bounded by the New Canal, Claiborne Canal and Carrollton avenue (*as to which there does not seem to be any time limit*); and

2. The construction or control of a line of railway from a crossing of the Mississippi River to its designated terminus within two years from March, 1881.

As to the first of these conditions, we deny the correctness of its language, as elsewhere stated at much length. The Section 6, above quoted, uses as to this matter only the phrase, "its terminus." The 4th Section of the former ordinance uses the phrase, "the terminus of said railway," and nothing more as to this matter. But passing on from this, what is a railway terminus? Is it an imaginary point in space? No. It is a station at the end of a railway; and a railway, like the one in question here, has at such a station depots, sheds, yards and tracks, some on its property, some on streets and other public places. The diagram put in and brought up by appellant, pp. 72, 73 of the transcript, shows the terminus established prior to July, 1882, and the tracks are laid in many of the streets intersecting

and adjacent to her property. The whole City here concerned is cut up into blocks and streets.

How could we establish a terminus without having a present and vested grant of right to lay tracks in streets and other public places, and do whatever else was necessary? If the grants were not *in presenti*, and the "estate" did not vest, we never could establish a terminus either where we did, and where the City, in 1882, said we did, nor where it now says we ought to have done. If the condition was, as now contended by the City, it is plainly subsequent and resolutory; because plainly the grants are not only couched in the present tense, but a present vesting is indispensable to enable us to comply with this condition.

As to the second of the only two conditions now claimed to be suspensive or precedent, the same reasons are conclusive against such a claim. How could we construct or control a line of railway from a crossing of the Mississippi River to our terminus, whether that terminus were to be at Thalia street and the Levee, where the City in 1882 said it had been established, or behind Claiborne street, where it now claims it ought to be? Only by laying tracks through and across streets and public places. If the grants under the ordinances did not vest *in presenti*, we could not do this, and the *reductio ad absurdum* follows at once. This condition is also plainly subsequent or resolutory.

III.

We called attention at p. 49 of our original brief to the point that the City of New Orleans was estopped by her own admissions, interpretation, conduct and ordinance from

claiming that our rights as dealt with in her repealing ordinances have been forfeited.

A municipal corporation may interpret and waive conditions; and may estop itself like other parties to a contract.

County of Randolph vs. Post, 93 U. S. 502, 513, and authorities there cited.

The construction which has been given by the parties themselves in such a case as this will solve a subsequent dispute, and afford a just guide to the Court. The rule of our Code, that where a doubt is raised as to the meaning of an agreement, "the construction put upon it by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation," C. C. 1956 (1951), is, we suppose, universal.

In Dermott vs. Jones, 2 Wallace, 1, 9, this Court said, that when a party "has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has *sanctioned* or accepted the work, he may recover in the common courts *indebitatus assumpsit.*"

In his article on conditions, already cited, Prof. Dwight states very concisely what is found in many decisions and text-books.

"In well drawn instruments a power of re-entry is expressly reserved.

"The rule is so rigidly adhered to that if a lease should prescribe that an estate of a tenant should on the happening of an event be null and void, a re-entry would still be necessary."

(That is, in the terminology of the civilians, the agreement would not be dissolved *pleno jure*).

And even if the conditions now claimed by the City to be suspensive or precedent were so (which we do not admit), *they have been substantially satisfied*, and this is sufficient.

"This rule leads to an important principle, that the right to take advantage of the forfeiture may be waived expressly or by implication, as where rent upon a lease is accepted with knowledge of the cause of forfeiture."

Forfeitures are not favored in law. Conditions precedent are satisfied by a substantial performance. Conditions subsequent are often waived, modified or declared satisfied by the party imposing them. Minor's Institutes, Vol. 2, 292-298.

Acts of recognition and confirmation are recognized in our Code, Article 2271 (2251) to Article 2274 (2254), and they may be express or tacit, and may result from writing or words, or action or silence. Culverhouse vs. Marx, 39 La. Annual, 809; Jouet vs. Mortimer, 29 *Id.* at p. 212. In the latter case the Court said, repeating what had been said in Landry vs. Connelly, 4 Robinson, 127-132:

"In the eighth volume of the Commentaries, under No. 491, Toulier mentions two sorts of ratifications, the second of which is: 'Celle par laquelle nous approuvons un contrat auquel nous avons concuru, ou auquel nous avons été appelés, mais qui était susceptible d'être attaqué pour des vices réels ou apparents, de nature à en faire prononcer la nullité ou rescision.' This last sort of ratification is that provided for in our Code, and in one, as well as the others, 'peut être faite expressement ou *tacitement*, verbalement, par écrit, ou par des *actes* qui manifestent notre volonté, parfois même par le *silence*.'

"Several instances of express and tacit ratification are found in our jurisprudence, in which this Court, in accordance with the principles recognized by Toulier, has uniformly decided that an act may be approved by implied or tacit ratification, though null and void *ab initio*." 10 Martin, 226; 7 La. An. 17; 4 Rob. R. 132.

See also Gayden vs. R. R., 39 La. An. 269; Thomas vs. New Orleans, 25 La. An. 660, 663.

The establishment of our great terminus and terminal facilities on our property, and also on and in streets and public places, assessed at $612,000, was known as well in New Orleans as the building of the New Library, or the Baltimore and Potomac terminals and tracks are known in Washington. The City administration knew it. It received from us as part of the work a new wharf that cost $5000. Outgoing and incoming freight and passengers were received there from March, 1882, and not elsewhere, in New Orleans. It was established and exists as a great terminal of about 1500 miles of railroad. When the ordinance of July 11th, 1882, No. 7946, as was adopted, it was at once an act of municipal legislation, of recognition, of confirmation, of interpretation, and, if need be, of waiver of any other theory as to the meaning of the words "its terminus," or "designated terminus," or "terminus of the railway." It was the same as to the "crossing of the Mississippi River," and the connection with Baton Rouge, and the connection of the terminus with the crossing of the River. Every one knew and felt in 1882 that it was better that the terminus should be designated and established by the Railway Company, on the river front, where ships could land, and where many thousands of cars that come and go would not have to cross the City to go west or to come in from the west. The cogent language of this Court in U. S. vs. Ala. R. R., 142 U. S., at p. 621, is much in point in this connection, on the effect of construction and interpretation given to a contract or grant by the authorities.

It is the City that has been in default in this case. She has neglected to select property to which to remove the

market from Claiborne street. She has refused us lines between Louisiana Avenue and Jackson street, thus crippling a well-planned system. By her ordinance of July 11th, 1882, on the one hand; and by her wrongful acts on the other, preventing us from completing the system, she is estopped. C. C. 2040 (2038).

Then came the repealing ordinance of 1884, Transcript, p. 8, and then the repealing ordinance of 1886, p. 7. Then in 1887 the City set policemen to prevent us doing even a small work at our terminals, p. 16, but retired from that contest, and the question is not before the Court. See agreement and order, p. 21. Most of these acts of neglect or wrong came, perhaps, from the sudden abolition of the City Government in the summer of 1882, and the substitution of a new charter, which brought in a new kind of people. We will not follow our learned opponent in his excursion outside of the record, and say what kind of people they proved to be. By their fruits in the record they may be partly known.

The equities of our case at the bar are great in every aspect. The conduct of the City since July, 1882, has been one series of neglect of its duty and violation of our rights. They are contract rights, and as to this we refer to the learned synopsis of doctrine and decision in Pearsall vs. Railroad, 161 U. S. at p. 663. See also Railroad vs. City of New Orleans, 46 La. An. 526, 529.

IV.

In its assignment of errors here, the City of New Orleans under the fifth point undertakes to raise a question which is not in the pleadings, was not discussed

in the court below, and is probably mooted here in this way in error. We refer to the allegation in regard to our wharves, etc., in front of our riparian property between Thalia and Terpsichore streets, under the 4th Section of Ordinance 6938, of March 29th, 1881. The City has never attempted to repeal this grant, it has never questioned its validity in any way, it has accepted a wharf we built for her in lieu of the former ruin at an expense of $5000 (Transcript, p. 31) ; and has collected taxes on the structures there built on an assessment of $612,000. The City is also still in Court in the suit of which her petitions are in evidence, Trans. p. 68, claiming that the Railway Company has availed herself of this grant and demanding a large sum for an alleged and disputed bill of paving.

The only reason for the testimony with regard to the terminals at Thalia street and the Levee was to show that the recitals of the Ordinance No. 7946, A. S., of July 11th, 1882, were *true;* in other words, that we had complied with the conditions of the Ordinances Nos. 6695, 6732 and 6938, by establishing and maintaining our terminus in the City limits and constructing and controlling a line ready for public use from a crossing of the Mississippi River to that terminus within two years. The facts in regard to these important terminals were also referred to as showing how the repealing ordinances were *injurious* as undertaking in two places to cut in pieces a system of tracks that was intelligent and in the public interest as affording facilities and lessening charges.

It would be very remarkable if, on this record and state of the case, this Honorable Court should feel called on to pass on the validity *vel non* of the 4th Section of Ordin-

ance 6938. And we think that the brief of the City shows that it does not insist on this part of the fifth assignment. The grant, it may be remarked in passing, is recognized by the Act printed in the Appendix.

V.

We note that the City proposes to refer the Court to an opinion in the case of Construction Company vs. Illinois Central R. R. Co., 49 La. An. 527. This opinion decided nothing. There are five Judges of our Supreme Court. One of them delivered an opinion. The Chief Justice concurred in the decree only. Another Justice concurred only in the decree, and gave some reasons which showed that he differed on some points with the author of the first opinion. The fourth dissented *in toto*, and the fifth concurred in this dissent. We have just as much right to say that the two Judges who dissented were right as the City has to say that the opinion to which the decree was appended was correct, perhaps a better right. On application for a rehearing the Court declared as follows:

"The District Judge maintained a plea of no cause of action and dismissed the plaintiff's suit, and they, having appealed, we revised his decree, a majority of the Justices entertaining the opinion that the petition disclosed a cause of action.

"The result of our decision is that the cause will be reinstated and remanded for trial according to law, and in the lower court it will have the same status that it had before this appeal was taken, the plea of no cause of action being omitted.

"We have decided no issue in the case. Those issues made as well as those which may be hereafter raised therein will be considered and determined therein by the District Judge, as they will be completely at large. But,

while expressing this view, we do not abandon or intend to modify the views which the majority of the Justices entertained originally, *i. e.*, that the plaintiff's petition discloses a cause of action."

So nothing was decided. But it may be interesting to note what the City, as *appellee*, contended for at p. 537, which is all in our favor in the case at the bar, and what Justice MILLER says at p. 555; and also the points for a rehearing at p. 528, and the reference at p. 530 to Act No. 70 of 1896, Sec. 2, p. 103. This statute of our General Assembly contains an express legislative recognition of the right of riparian proprietors to maintain for their exclusive use wharves established prior to the passage of the act under whatever authority constructed. We refer to it elsewhere.

VI.

The contention of the City in regard to a passenger depot on Claiborne street, in place of a market, as it now appears, is not easy to understand.

In the repealing Ordinance No. 1828, C. S., one of the two of which we complained, the rights on Claiborne street are sought to be repealed. The reasons, if such, they may be called, are recited, the "alien corporation," and so on, the non-compliance with "conditions," plainly resolutory, the delay for so doing having "elapsed;" and it is then declared that "it is necessary for the public good that Claiborne street between Common street and the Old Basin shall be used for steam and horse railway and depot purposes." Transcript, p. 7. That is just what we claim the right to do under the second section of the first ordinance, pp. 54-55, and in the same *locus*. In other words, the City is to take it from us and give it to somebody else, and

when we protest we are now told that it cannot give the right to anyone. We believe it to be elementary, that when a party has put his case on a specific ground he is not permitted to shift his position, and, as this Court has said, to "mend his hold." R. R. vs. McCarthy, 96 U. S. 258-267.

But in the answer the City tries to "mend its hold." It says that Claiborne street (which is nearly 200 feet wide), "through which it is purposed to pass a railroad track and erect a depot near Canal street (between Common and Canal streets), on what is known as the neutral ground, a space of ground dividing said Claiborne street, and which had been dedicated to public use; that same had been planted with trees and arranged for matters of public necessity for the health and salubrity of the city; that the original act granting *right of way* through said premises was *ultra vires*, null and void."

But even trying to mend its hold, the answer does not claim that to allow a passenger depot to be built on the neutral ground between Common and Canal streets is *ultra vires*. It could certainly be no more unlawful than a market house.

And now come the assignment of errors and the brief of the City, and ignore the statement in the repealing Ordinance 1828, and the limitations of the answer, and say that it is *ultra vires* to allow a *passenger depot* at this spot, an attempt to "mend its hold" a second time.

There is no force in this last contention, even it can be considered. The "neutral grounds" of our very wide streets are not roadways or streets, but wide spaces between what are two highways or streets. They are almost all filled

with street railroad or steam railroad tracks, and there are passenger depots in some of them, as on the neutral ground of Basin street at Canal street. There was formerly one across the neutral ground of St. Charles Avenue at Napoleon Avenue. Such structures can be made ornamental and comfortable. They are no more improper than a market. Brown vs. Duplessis, 14 La. Annual, 842; Pulley vs. Municipality, 18 La., at p. 284. Not one of the cases cited by appellee is in point.

Respectfully submitted,

W. W. HOWE,

J. F. DILLON,

Of Counsel for Appellee.

DECEMBER 30, 1897.

APPENDIX.

The following is the second section of the Act of 1896 of the General Assembly of Louisiana, No. 70, Session Laws, page 103. The Act places the Port of New Orleans under the charge of a Board of Commissioners;

"SEC. 2. Be it further enacted, etc., said Board of Commissioners shall have power to regulate the commerce and traffic of the Harbor of New Orleans in such manner as may in their judgment be best for its maintenance and development. They shall have and enjoy all the rights, powers and immunities incident to corporations. They shall be empowered, and it shall be their duty to take charge of and administer the public wharves of the Port of New Orleans; to construct new wharves where necessary; and to erect sheds thereon to protect merchandise in transit; to place and keep the wharves, sheds, levees and approaches in good condition; to maintain sufficient depth of water and to provide for lighting and policing such wharves and sheds; to defray said expenses they shall charge upon the shipping visiting the port, for the use of wharves, etc., of the port of New Orleans, not exceeding one cent per net register ton per 24 hours (commencing at midnight just preceding the arrival of the vessel) for the first six days, provided the minimum charge on seagoing vessels shall not be less than $5.00. Where sheds are provided by said Board of Commissioners, shipping using same shall pay an additional charge of ½ cent per net register ton for 24 hours (time to be calculated same as above), said charge, however, in any case not to exceed cost of construction, maintenance and management of said improvements, *provided that nothing in this Act shall apply to wharves owned by riparian proprietors, whether individuals, firms or corporations, and maintained and used by the owner or owners or their lessees.*"